HUM PENG SIN @ HAM LIN KIN (SUAMI KEPADA CHIAM KAO KEE @ CHEAN KAO KEE (SIMATI) SEBAGAI DEPENDAN)

v.

LIM LAI HOON & ANOR.

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL APPEAL NO. 12-63-1995]
24 JANUARY 1996

DAMAGES: *Fatal accident - Loss of services of wife - Whether claimable - Interpretation of Civil Law Act 1956, s. 7(3) - Whether amendment abolished award for loss of services of wife - Whether actual monetary expense still claimable - Appropriate multiplier - Whether appellate Court will review award.*

CIVIL PROCEDURE: *Assessment of damages - Interference by appellate Court - When will appellate Court review inferior Court's assessment of damages.*

This was an appeal by the appellant against the decision of the Sessions Court in a running-down action. The appellant had brought an action against the respondents under s. 7 of the Civil Law Act 1956 (the Act), claiming for loss of dependency solely on his own behalf as a result of the death of his wife (the wife). The trial Judge held the respondents 100% liable for the death of the wife, and awarded damages in the sum of RM21,600 for loss of support, RM10,000 for bereavement, and RM2,500 for funeral expenses. However, the trial Judge rejected the appellant's claim for loss of services of the wife, and used a multiplicand of RM240 to calculate damages for loss of support as opposed to the appellant's claim for damages based on a multiplicand of RM450. The trial Judge did not follow the *ratio decidendi* in the case of *Chong Pik Sing & Anor v. Ng Mun Bee & Ors.* on the ground that that case was decided before the 1984 amendments to s. 7(3) of the Act, and held that s. 7(3)(iii) of the Act debarred the appellant from claiming for loss of services of the wife.

The appellant appealed on two grounds: (1) that the trial Judge was wrong in law in not awarding damages for loss of services of the wife; and (2) that the trial Judge had erred in using the multiplicand of RM240 per mensem to calculate damages for loss of support.

Held:

[1] General damages for loss of consortium of a wife have never been allowed by our Courts, even before the 1984 amendments to the Act. What was allowed were damages for 'loss of services rendered by a wife and

capable of being valued in pecuniary terms,' such as housekeeping, provided it could be shown by the husband that actual quantifiable loss had been incurred in money or money's worth and would continue to be so incurred.

[2] The Legislature has, by its 1984 amendments to s. 7(3) of the Act, clearly intended to abolish any awards for loss of services of a wife, thus debarring a male spouse's claims for the loss of the services of his deceased wife, including the equivalent monetary loss in terms of housekeeping.

[3] However, the recent decision of the Court of Appeal in *Neo Kim Soon, Pentadbir Kepada Harta Pusaka Phanna Mannechuang v. Subramaniam Ramanaidu & Anor*. appears to have established a novel proposition of law, ie, that even the new s. 7(3)(iii) of the Act does not preclude a male spouse from claiming for the actual monetary expenses that he has paid, and will have to continue to pay, to a housekeeper to look after a child of the family. Although the operative words in s. 7(3) is couched in the past tense as "expenses incurred," the *ratio decidendi* of the said Court of Appeal decision appears to suggest that instead of claiming for loss of services, a male spouse can claim for past and future expenses.

[4] In the instant case, the Court was of the opinion that, as such expenses entail and directly result in loss of expenditure which, in turn, is consequential upon loss of services, such loss of expenditure and loss of services are but from the same kettle of fish. It follows, therefore, that such expenses (especially expenses to be incurred in the future) due to the loss of a wife's services, cannot, by virtue of the new s. 7(3) of the Act, form any part of a dependency claim.

[6] Even on the assumption that the appellant could claim for past and future expenses, he had failed, on the evidence, to show that actual quantifiable loss had been incurred in money or money's worth and would continue to be incurred.

[5] In any event, the appellant was not claiming for expenses on housekeeping, but for damages for the loss of the services of his deceased wife.

[6] The principle on which an appellate Court reviews the assessment of damages, whether too high or too low, is not because the appellate Court might have given rather more or rather less, but only if the trial Judge has omitted some relevant consideration or admitted some irrelevant consideration, or has acted upon some wrong principle of law, or has awarded an amount so extremely high or so very small as to make it a wholly erroneous estimate of damage. Consequently, the multiplicand of RM240, though somewhat on the low side, should not be disturbed.

Obiter dictum:

[1] It is crystal clear that by s. 7(3)(iv) of the Act, Parliament has, albeit against common law principles, legislated away the capacity and the financial potential of persons past 55 years of age to earn any income after that age, however real has been the loss resultant upon their death.

[2] This appeal has raised a kaleidoscope of issues and problems, which stems in part from the failure of the Legislature to craft its language in more precise terms on this part of the law. Perhaps, s. 7(3) of the Act could be reviewed with a view to legislative correction to allow for more equitable awards based on common law principles.

[Appeal dismissed]

Cases referred to:

Chong Pik Sing and Anor. v. Ng Mun Bee & Ors. [1985] 1 CLJ 332; [1985] 1 MLJ 43 ***(not foll)***

Berry v. Humm & Co. [1915] 1 KB 627 ***(refd)***

Jeffrey v. Smith [1970] 114 Sol. J 218 ***(refd)***

Regan v. Williamson [1976] 1 WLR. 305 ***(refd)***

Neo Kim Soon, Pentadbir Kepada Harta Pusaka Phanna Mannechuang (Simati) v. Subramaniam a/1 Ramanaidu & Anor. [1996] 1 CLJ 730, [1995] 3 AMR 2941 ***(not foll)***

Tan Kuan Yau v. Suhindrimani [1985] 2 MLJ 22 ***(foll)***

Topaiwah v. Salleh [1968] 1 MLJ 284 ***(foll)***

Greenfield v. London and North Eastern Railway Company [1945] KB 89 ***(foll)***

Wilson v. Pilley [1957] 3 All ER 525 ***(foll)***

Elliott v. Preston [1971] 2 L1LR 328 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 7, 7(3), 7(3)(iii), 7(3)(iv), 7(3)(i) to (iv), 7(7)

Fatal Accidents Act 1846, (UK)

For the appellant - D.P. Rajah; M/s. Rajah & Co.

For the respondents - D.S. Ilangovan; M/s. V.P. Nathan & Partners

JUDGMENT

Vincent Ng Kim Khoay J:

This was an appeal by the appellant/plaintiff against the decision of the Judge of Butterworth Sessions Court, Tuan Tarmizi bin Abdul Rahman, delivered on 29 April 1995 in a running-down action, in which the appellant's wife Chiam Kao Kee @ Chean Kao Kee (hereinafter referred to as the deceased) was killed. The appellant had brought a claim under s. 7 of the Civil Law Act 1956 (the Act) for loss of dependency on his own behalf though, notably, not on behalf also of his two children by the deceased. The significance of this will be related later in my judgment.

At the conclusion of the trial, the Court held the respondents 100% liable for the accident and awarded damages for pre-trial and post-trial loss of earning in the sum of RM21,600, RM10,000 for bereavement and RM2,500 for funeral expenses.

The Sessions Court Judge disallowed the appellant's claim for loss of services of the wife and employed the multiplicand of RM240 to calculate loss of services, through which he arrived at a pre-trial and post-trial loss of RM21,600. Consequently, the two grounds of appeal were: the learned Sessions Court Judge was wrong on points of law, in not awarding loss of services of the wife, and in using the multiplicand RM240 per month to calculate the loss of support and not the figure RM450 as claimed by the appellant.

Section 7(3)(iii) of the Civil Law Act 1956 (Amended in 1984) states:

> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any **reasonable expenses incurred** as a result of the wrongful act, neglect or default of the party liable under subsection (1):
>
> Provided that:
>
> (i) ...
>
> (ii) Damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought.
>
> (iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife;

Before me, Counsel for the appellant, Mr. D.P. Rajah interpreted the word "only" in the proviso to mean that the appellant could claim for loss of services of his wife if other claims for loss, for example, loss of support, bereavement and for funeral expenses are also made, as was his client's case. This submission is irrelevant and does not call for any discussion save to say that it is absurd to presume that a claim solely for loss of services and nothing else could have been within the scope of the legislature's comtemplation.

On 18 August 95, immediately after hearing the submission of both Counsel, I dismissed the appeal. The Sessions Court Judge had held that s. 7(3)(iii) of the Act was clearly intended to debar the appellant from claiming for loss of services suffered by him due to the deceased's death, and that the case of

Chong Pik Sing and Anor. v. Ng Mun Bee & Ors. [1985] 1 MLJ 43 cited by the appellant's Counsel was no longer good law since that case was decided before the amendment.

At the time of hearing, in considering whether the Sessions Court Judge was correct in the construction that he had placed on the new s. 7(3)(iii), I had taken the following approach. Damages for loss of consortium have never been allowed by our Courts even before the amendment. What was allowed was loss of services rendered by the wife and capable of being valued in pecuniary terms, such as housekeeping and looking after children, which the wife had gratuitously rendered to the husband. The dicta of Seah SCJ in *Chong Pik Sing* is illustrative:

> ... we are of the opinion that the learned Judge was wrong to make an award for damages for **loss of consortium** to the husband under sub-section (3) of s. 7 of the Civil Law Act 1956. In our judgment, such an award would appear to be contrary to the authorities and the law. On the other hand, it has been held that the loss need not be a monetary loss: a loss of services rendered by the wife and capable of **being valued in pecuniary terms will suffice, such as housekeeping**. It follows that in practice the pecuniary loss suffered by a husband through the death of his wife by a negligent act or omission of the defendants is usually comprised of loss of services which the wife had gratuitously rendered for him. In our judgment, the learned Judge was right, to make an award for damages under this head.

This case was decided during the operation of the old s. 7(3), expressed thus:

> In every such action the Court may give damage as it thinks fit proportioned to the loss resulting from the death to the parties respectively for whom and for those benefit the action is brought by.

The position in law pre-amendment is thus pretty clear. The damages for loss of consortium was never allowed but damages that are capable of being valued in pecuniary terms such as housekeeping, child minding or looking after children was allowed provided it could be shown by the husband that actual quantifiable loss has been incurred in monies or monies' worth and will continue to be incurred, as a direct result of the negligence of the wrongdoer.

As such, my view is that the legislature had, by the amendment in s. 7(3), clearly intended to abolish any award for loss of the services of the wife such as defined above, considering that the loss of consortium of the wife by way of general damages was never ever allowed and hence, not at issue at the time of the amendment. The right of one spouse to the company, assistance, affection and companionship of the other, in other words, the myriad of other services - perhaps facetious of me to elaborate or define - provided *gratis* to the husband by a good wife has been expressed in felicitous language as the right to consortium. "Loss of services" rendered by the wife and capable of being valued in pecuniary terms has been sufficiently defined in *Berry v. Humm*

& Co. [1915] 1 KB 627, *Jeffrey v. Smith* [1970] 114 Sol. J 218, *Ragan v. Williamson* [1976] 1 WLR. 305. In *Berry v. Humm* (*supra*) it was held that under Fatal Accidents Act 1846 (Lord Campbell's Act), the damages recoverable in such an action, "are not limited to the value of money lost, or the money value of things lost, but include the monetary loss incurred by replacing services rendered gratuitously by the deceased where there was a reasonable prospect of their being rendered freely in the future but for the death", such as housekeeping and looking after children of the family; in lighter vein, a role often uncapsulated in the expression "minister of home affairs".

As an aid to construction, it may perhaps be helpful to bear in mind that this amendment is s. 7(3)(iii) came in the same package as s. 7(3)(iv) which is here set out:

> iv. in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> (a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death.

As one would recall, the amendment in s. 7(3)(i) to (iv) stirred up some controversy in legal circles for being a piece of legislation which would adversely and materially affect just claims for damages suffered by a widow or a widower in respect of real, tangible and quantifiable loss of services of the deceased wife or future earnings by the deceased husband. The expressed intention of Parliament at that time when the bill to amend s. 7(3) was tabled, was that the proposed amendment was to check the escalation of quantum of awards. It is thus crystal clear that by s. 7(3)(iv) Parliament has, albeit against common law principles, legislated away the capacity and the financial potential of persons past 55 years of age to earn any income after that age, be they High Court Judges (despite their security of tenure up to 65 years of age) or successful businessmen - however real has been the loss resultant upon their death. Similarly, in my view Parliament must have intended by its provision in s. 7(3)(iii), to debar a male spouse's claims for loss of services of his deceased wife, including their equivalent monetary loss, in terms of housekeeping, child minding or looking after children.

For all the reasons set out above, I was on 18 August 1995, *ad idem* with the interpretation placed on s. 7(3)(iii) of the Act by the Court below. However, following the appellant's successful application on 15 January 1996, for leave

to appeal to the Court of Appeal from my decision, I had occasion to embark upon some research, and found the authority *Neo Kim Soon, Pentadbir Kepada Harta Pusaka Phanna Mannechuang (Simati) v. Subramaniam a/l Ramanaidu & Anor.* [1995] 3 AMR 2941). This being a Court of Appeal decision pronounced on 2 August 1995 and published in the All Malaysia Reports on 6 December 1995, which contained a *ratio decidendi* on the new s. 7(3) of the Act.

In *Neoh Kim Soon's* case, the plaintiff had made a claim for himself and for his son. He was not claiming for the equivalent monetary value of the services provided by the deceased but the actual monetary expense he had paid to the housekeeper to look after his son from the time of the death of his wife and continuing. The Court of Appeal would appear to have taken a novel, though sensible approach on the question of whether a husband could claim for loss of his wife's services. Their approach was perhaps founded upon the principle that existing rights pre-amendment could not be removed without explicit legislative pronouncements; which is absent in s. 7(3)(iii). I say novel, because it would appear that that case has established a proposition of law that s. 7(3)(iii) does not preclude a male spouse from claiming **for the actual monetary expenses** that he has paid to the housekeeper and would have to continue to pay the housekeeper to look after a child of the family. Therein, such expenses were allowed for caring the boy for 11½ years from the date of the accident. Two passages from this recent Court of Appeal decision would be apposite here, (at p. 2946):

> Here the plaintiff was making the claim both for himself and for his son. He was **not claiming for the equivalent monetary value of the services** provided by the deceased **but the actual monetary expense** he had paid to the housekeeper and would have to continue to pay the housekeeper to look after this boy for 11½ years from the date of the accident.

and at p. 2947:

> As a matter of interest, we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother but we do not think that it is necessary for this appeal to say anything more about this except that it follows from what we have said that wherever it can be shown whether by a parent, a surving spouse or a child that actual quantifiable loss has been incurred in money or money's worth and will continue to be incurred as a direct result of the negligence of the wrongdoer, such loss will be recoverable even if there was no direct financial contribution made by the deceased to or on behalf of the person for whose benefit the action was brought.

It was a sensible decision because it would be unfair and unjust to preclude a male spouse from claiming (under s. 7 of the Act) the actual quantifiable loss and monetary expense that he has incurred and would have to continue to incur in terms of housekeeping as a direct result of the negligence of a wrongdoer.

Admittedly, in considering the question of expenses, I have encountered some difficulty due to the operative words in s. 7(3) being couched in the past tense as "expenses incurred". This provision is thus incapable of facile interpretation since it would appear to indicate that only expenses incurred in the past (but not future) are claimable even if deemed to be allowed under the provision; though the ratio in *Neo Kim Soon* (*supra*) would seem to suggest that instead of claiming for loss of services the male spouse could claim loss of past and future expenses.

I am of the opinion that, as loss of such services entails and directly results in loss of expenditure which in turn is consequential upon loss of services, such loss of expenditure and loss of services are but from the same kettle of fish. Should this argument be tenable, then it would follow that loss of such expenses (especially expenses to be incurred in the future) due to loss of the wife's services, could not, by virtue of the new s. 7(3)(iii) of the Act, form any part of a dependency claim.

Nevertheless, be that as it may, on the principle of *stare decisis*, it would appear that I had unwittingly (as that case was not brought to my attention) misdirected myself on the law in respect of s. 7(3)(iii) as it stood post - *Neo Kim Soon* (*supra*) when I dismissed the appellant's first ground of appeal.

Be it noted that in the current case, the appellant had claimed for loss of his wife's services rather than loss of expenses on housekeeping, as indeed, his Counsel had throughout contended that s. 7(3)(iii) does not have the effect of precluding a claim for loss of services unless such loss constituted the "only" claim. It is also to be noted that the appellant's claim for loss of support from the wife has clearly overlapped with his claim for loss of services due to the death of his wife. Indeed, damages for loss of support was allowed to the appellant on the multiplicand of RM240, which has in fact given rise to his second ground of appeal.

Further, even on the assumption that the appellant could claim for the loss of past and future expenses, he would, on the authority of *Neo Kim Soon* (*supra*), still have to show to the Court "that actual quantifiable loss has been incurred in money or money's worth and will continue to be incurred as a direct result of the negligence of the wrongdoer."

In this regard, it is now noted that there was robust and vigorous challenge by the respondent on the question whether a maid was in fact hired to do the housework. The learned Sessions Court Judge has not considered this issue or made any finding either way, presumably due to his decision on s. 7(3)(iii).

It would be pertinent to observe that PW1 (the appellant) had said that Ah Lan had worked for him for 2 years, whereas PW4 (the alleged maid) had testified that her name was Ng Suan Loke, she had worked for PW1 but

could not remember when she stopped work. In cross-examination, PW4 said that No. 22 Lorong Kurau 9, Chai Ling Park was the address where she was staying and that address was her house which she purchased over 10 years ago. When it was pointed out to her that No. 22 Lorong Kurau 9 was put in by the appellant himself as his own residential address in his police report (dated 16 October 1989) following the accident, she replied that the respondent's wife stayed with her and he (the appellant) had used her (the maid's) address for correspondence purposes. Thus, could the Court believe her story that her employer was staying in her house while she was employed by him as a housekeeper, on the salary of RM280 per mensem? Her evidence would appear to contain all the hallmarks of a witness who had lied on oath. Also, in this regard, the fact that deceased's wife was not a housewife but was working at Armstrong Parts Sendirian Berhad as a production operator in its cable department at the time of the accident, ought to be taken into account. As she was a working wife, if at all the services of a housekeeper was required by the appellant, such housekeeper would be as much required before as after her demise. Consequently in my opinion, the appellant would fail in his quest for loss of services or loss of expenses, in any event due to this infirmity and the lack of any credible or cogent evidence in support thereof. However, as I had not given any opportunity to both Counsel to address me on this score, it would be unfair to the appellant for me now to state that this issue was also considered when I dismissed the first ground of appeal. I shall thus have to leave this part of the issue for the consideration of the Court of Appeal.

The other ground of appeal brought by the appellant was on the question of what multiplicand to use to calculate the loss of support. The appellant testified that his wife earned about RM660 p.m. and gave RM450 to her husband every month. The learned Sessions Court Judge took into account the fact that the deceased had to pay RM90 p.m. on instalment payments for her motorcycle and that she spent on food, clothes, petrol and other things, and concluded that the sum of RM240 per mensem was a more reasonable and realistic figure than RM450 per mensem to adopt as the multiplicand.

It is common knowledge that generally speaking, a working wife does not contribute as high a proportion of her income towards family expenses as her husband. Hence, the multiplication of RM240, though somewhat on a low side, should not be disturbed on appeal, as the appellant here has not shown that the Court below had employed an erroneous principle in pegging the multiplicand on this figure. In *Tan Kuan Yau v. Suhindrimani* [1985] 2 MLJ 22, Abdul Hamid CJ (as he then was) had cited with approval the case of *Topaiwah v. Salleh* [1968] 1 MLJ 284, 285 and restated the principle that an appellate Court is slow and disinclined to interfere with the Judge's finding merely because the appeal Court thinks that if the case had been before it in the

first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the judgment of the Federal Court in *Topaiwah v. Salleh* held that:

> ... So far as this Court is concerned we should, to paraphrase Greer LJ in *Flint v. Lovell* [1935] 1 KB 354 be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages. The assessments which the Courts have made over the years form some guide to the kind of figure which is proper and which the Appellate Court will follow in the light of the special facts of each particular case.

Again in *Greenfield v. London and North Eastern Railway Company* [1945] KB 89, MacKinnon LJ had this to say:

> The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the Judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

Lord Evershed MR in *Wilson v. Pilley* [1957] 3 All ER 525, 526 emphasized that:

> ... interference by this Court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county Court. No one would suggest that, because this Court thought that the damages, small in any case, were rather on the low side, this Court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

I would also refer to *Elliott v. Preston* [1971] 2 L1LR 328, 330 where Salmon LJ had this to say:

> Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a Court has to be satisfied that it is wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this Court entitled to interfere, but it is its duty to interfere. I would agree ... that you cannot say, if it is wrong by such and such a per cent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.

In any event, it may be pertinent to observe that the appellant's evidence on loss of support was vague and tenuous. He said that on account of his wife's death he had loss her income - contribution of RM450, but he did not say what that amount was to be used for. This is fatal and incurably so upon the conclusion of the trial, bearing in mind that according to the title and the pleadings in the statement of claim, he had only claimed for loss of support for himself but not for his children, the details of which are required to be particularised under s. 7(7) of the Act. (See and contrast the case of *Neo Kim Soon* (*supra*)). The appellant was indeed fortunate to have been at all awarded loss of support, even on the multiplicand of RM240; pertaining to this however there was no cross-appeal by the respondents.

Truly, this appeal has raised a kaleidoscope of issues and problems, which stems in part from the failure of the legislature to craft its language in more precise terms on this part of the law. With the executive's recent curtailment and adjustment of agency commission and their intended reformative measures in the insurance industry, perhaps s. 7(3) could be reviewed with the view to legislative correction to allow for more equitable awards based on the common law principles.

Reported by Gan Peng Chiang